

FILED

IN THE CHANCERY COURT FOR KNOX COUNTY, TENNESSEE

FIRST CENTURY BANK and
J. MICHAEL WINCHESTER,
SUCCESSOR TRUSTEE,

Plaintiffs,

v.

HALLS MEMORY GARDEN, INC.,
ESTATE OF GEORGE W. FORTNER,
BEVERLY A. REYNOLDS,
SANDRA J. STRINGFELLOW,
LESLIE NEWMAN, in her capacity as
Commissioner of the Tennessee Department
of Commerce & Insurance, LOREN L.
CHUMLEY, in her capacity as
Commissioner of the Tennessee Department
of Revenue, JAMES NEELEY, in his
capacity as Commissioner of the Tennessee
Department of Labor & Workforce
Development, and FRANKLIN CREDIT
SERVICES, INC.,

Defendants.

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HOWARD G. HOGAN

Docket No. 162401-1

STATE OF TENNESSEE'S MEMORANDUM IN SUPPORT OF ITS
MOTION FOR REVOCATION OF THE CORPORATE CHARTER OF
HALLS MEMORY GARDEN, INC., THE SALE OF ITS ASSETS, AND THE
RESOLUTION OF THIS CASE

The State of Tennessee, through the Attorney General and the Commissioner of Commerce & Insurance, submits its memorandum brief in support of its motion for the Court's revocation of the charter/certificate of authority of Halls Memory Garden, Inc. ("Halls"), the sale of Halls' assets, and the resolution of this case.

INTRODUCTION AND BACKGROUND

Brought to obtain a judicial foreclosure of a deed of trust on cemetery property (the "Cemetery"), this action has been pending for more than four and one-half years. Since the lawsuit was filed in October 2004 one individual defendant has died, his estate has been substituted as a defendant, and that estate has been administered and closed. Two individual defendants have received discharges in bankruptcy. Halls and the Cemetery have been placed in receivership. On motion of the State, the trust company of Sterne, Agee & Leach, Inc., ("Sterne"), the former trustee of Halls' improvement care and merchandise and services trust funds, was joined as a third party defendant. Myron C. Ely as trustee and Thomas P. and Barbara Sumter as beneficiaries under a deed of trust encumbering a separate parcel of Halls' property also were joined as third party defendants, again on the State's motion. The third party action against Sterne was settled, with the trust company paying the State \$47,000.00 for depositing to the trust accounts. A new trustee, Independence Trust Company, was then appointed. The third party action against Mr. Ely as trustee and the Sumter's was resolved, at least temporarily, in May 2007 when the Court denied their motion for leave to foreclose the Sumter's deed of trust. A receiver and a successor receiver have been appointed by the Court and conflicting claims to lot ownership, and a number of issues related to pre-paid contracts, have been addressed by them. But concerted efforts to achieve a major goal of the receivership – the sale of the Cemetery and Halls' adjoining 3.17 acre tract of undeveloped land – have failed.

Other unresolved issues also remain. The plaintiff bank has not realized its goal of obtaining repayment of a loan secured by a deed of trust on the Cemetery. The Commissioner of Commerce & Insurance (the "Commissioner") has not achieved her goal of fully funded cemetery trust accounts. And numerous purchasers of burial plots, merchandise and services,

cheated out of what they bought by an unscrupulous cemetery operator, have received less than adequate redress for their losses. To help those individual purchasers and their families, Tennessee's General Assembly has appropriated \$50,000.00 for victims' restitution. That sum is in an interest bearing account maintained by the Knox County Clerk and Master.

Presently before the Court is the State's motion to revoke Halls' corporate charter and to sell the cemetery company's assets – the Cemetery itself to a newly formed not-for-profit corporation seeking to operate it as a community cemetery, and the adjoining 3.17 acre tract to be sold separately, with the proceeds first being used to pay delinquent property taxes, unless a retroactive exemption from the State Board of Equalization or the Knox County Trustee is obtained, in which event the sale proceeds would first be applied to the successor receiver's fees and expenses. The proposed charter revocation and property transfer are part of the State's plan to conclude this case under the best possible terms.

STATEMENT OF THE FACTS

Recounting every detail of this prolonged litigation is not necessary. Addendum No. 1 to the Court's May 25, 2007 memorandum opinion (Exhibit A to the State's pending motion) supplies a factual history of the case through that date, and subsequent history pertinent to the State's motion is discussed elsewhere in this brief.

In its memorandum opinion the Court has already addressed a key issue relevant to the State's pending motion – the issue of priority between the rights of the State, which earlier sought to have the two cemetery trust funds replenished through a single sale of the Cemetery and Halls' undeveloped 3.17 acres, and the conflicting lien rights of Mr. and Mrs. Sumter under their purchase money deed of trust on that tract. In 2007 the Sumter's sought to foreclose that deed of trust, contending among other things that their rights under a purchase money trust deed

could not be trumped by the Commissioner's rights to replenish the trust accounts from the parcel's sale proceeds. The Commissioner, the successor receiver, and the plaintiff bank opposed the motion for leave to foreclose and the motion was denied, the Court having determined and set out in its memorandum opinion that the right of foreclosure, even under a purchase money deed of trust, is subordinate to the Commissioner's rights to have Halls' real property, needful for cemetery purposes, sold in order to cure deficiencies in the statutorily mandated trust accounts.

With the assistance of pro bono legal counsel, a not-for-profit corporation, Fort Sumter Community Cemetery Corporation ("Fort Sumter" or the "New Corporation"), has been formed by members of Knox County's Halls Community. The incorporator has an interest in the Cemetery, either through lot ownership or through having the remains of loved ones buried there. As stated in its charter, a copy of which is made Exhibit B to the State's motion, the New Corporation seeks to acquire ownership of the Cemetery and to operate it as a community cemetery, providing upkeep and maintenance and permitting burials when proof of lot ownership is given. The New Corporation does not intend to sell lots, however, and therefore is not seeking ownership of the adjoining 3.17 acres for the community cemetery's expansion.

Because the New Corporation has little or no money with which to buy the Cemetery and because failed sales attempts have demonstrated that the Cemetery has little monetary value, the State proposes that after revoking Halls' charter, the Court sell the Cemetery, and any structures located thereon, free and clear of all liens, to the New Corporation for a nominal consideration. The New Corporation presently lacks sufficient funds to operate a community cemetery, however. No revenue will be earned, as there is no intent to sell lots, and the trust fund balances are deficient by a combined amount of more than \$68,000.00. As demonstrated in the affidavit

of Robert Gribble, which is attached as Exhibit C to the State's motion, the deficiencies in the improvement care and merchandise and services trust funds are \$29,922.68 and \$38,341.75, respectively. While the interest income from the present balance of the improvement care trust fund may be used by the New Corporation under Tenn. Code Ann. § 46-1-204 to provide for the improvement care and maintenance of the Cemetery, such funds will not be sufficient: (1) to pay the delinquent county property taxes against the Cemetery; (2) to cover repairs the New Corporation may need to undertake at the Cemetery; and (3) to purchase needed equipment and/or services for cemetery operations. To remedy these problems, the State further proposes the following:

1. That the merchandise and services trust account be closed and its small balance of approximately \$3,426.67 transferred into the improvement care trust account. Due to the substantial and overwhelming number of receivership claims for pre-paid burial services and/or merchandise, the balance of the merchandise and services trust account is *de minimis*. Moreover, the other receivership assets are insufficient. Accordingly, persons seeking reimbursement for pre-paid burial services and/or merchandise will receive no direct payment of money, nor will any other general creditors of Halls.
2. That the \$50,000 in victims' restitution money appropriated by the General Assembly, together with accrued interest, be transferred from the depository account maintained by the Clerk and Master to be used first to correct the remaining deficiency in the improvement care trust fund, with the balance being made available to the New Corporation to provide a modest amount of working capital for community cemetery operations.

3. That the adjoining 3.17 acres titled to Halls be sold separately, with net sale proceeds first being used to pay the delinquent property taxes on the adjoining 3.17 acres and the Cemetery property, if an exemption or waiver is not obtained, with any remaining balance being applied to receivership fees and expenses.

LAW AND ARGUMENT

The Court's revocation of Halls' charter and the sale of Halls' assets as the State proposes would be an appropriate exercise of the Court's authority and, given the circumstances of this particular case, would result in this receivership action's best possible conclusion.

I. THE COURT IS AUTHORIZED TO REVOKE HALLS' CHARTER AND TO SELL ITS ASSETS.

The Court's authority to revoke the cemetery company's charter is provided in the Cemetery Act of 2006 (the "Act"), Tenn. Code. Ann. §§ 46-1-101, *et seq.* Section 46-1-309 of the Act states that a cemetery company's failure to comply with the provisions of § 46-1-204, which provides for establishment and funding of the improvement care trust fund, or § 46-1-215, which requires cemetery companies to file financial reports annually, constitutes grounds for revocation of the cemetery's charter or certificate of authority upon the Commissioner's filing a revocation proceeding in the Chancery Court of the county where the cemetery is located. Additionally, § 46-1-307(b) provides that the Court may order the seizure and sale of the cemetery's assets to remedy an existing deficiency in any trust fund required by the Act.

Every cemetery company is required to "establish and forever maintain an improvement care trust fund . . . to provide for the improvement care and maintenance of the cemetery[.]" Tenn. Code Ann. § 46-1-204(a). Each cemetery is required to make deposits into the trust fund established and maintained by it. Deposits of specified amounts from the proceeds of the sale of lots, lawn crypts and other items is required. *Id.* Furthermore, every cemetery selling pre-need

sales contracts for merchandise and services is required under the Act to deposit an amount “equal to the procurement costs of the merchandise and services identified in the sales contract, plus twenty percent (20%) of the costs, in a special general fund trust account in a state or national bank authorized by law to administer trust funds.” Tenn. Code Ann. § 46-1-207(b)(1)(B). Halls long ago stopped making deposits to its trust accounts, and deficiencies exist in both the improvement care and the merchandise and services trust funds. As shown by the affidavit of Robert Gribble the improvement care trust fund deficiency is \$29,922.68 and the merchandise and services trust fund deficiency is \$38,341.75.

If the improvement care trust fund or the merchandise and services trust fund has a deficiency, which in this case is established above, the Act authorizes the court in which the revocation proceeding is pending to “appoint a receiver to operate the cemetery or, *if necessary, order the seizure and sale of the assets of the cemetery company*, to the end that the trust be made whole.” Tenn. Code Ann. § 46-1-307(b) (emphasis added). This Court is authorized further to correct the deficiency in the improvement care trust account under Tenn. Code Ann. § 46-1-309. That statute authorizes the Court, after a hearing, to order “the seizure and sale of the cemetery company’s assets to the extent necessary to set up the improvement care trust fund as required.” The statute also authorizes the Court, after it revokes the cemetery company’s charter or certificate of authority, to order “the sale of the whole company property after the improvement care trust fund has been set up, so the purchaser of the cemetery may continue to operate and maintain it under the terms of this chapter.” Fort Sumter’s plan to operate the Halls cemetery as a community cemetery is contemplated by the Act and the Commerce and Insurance

Department's rules and regulations. *See* Tenn. Code Ann. § 46-1-106(b) and Rules of the Department of Commerce and Insurance at Rules 0780-5-9-.14 – 0780-5-9-.19.¹

II. UNDER THE CIRCUMSTANCES OF THIS CASE, THE MERCHANDISE AND SERVICES TRUST ACCOUNT SHOULD BE CLOSED AND ITS SMALL BALANCE TRANSFERRED INTO THE IMPROVEMENT CARE TRUST ACCOUNT.

In addition to its other shortcomings, Halls failed to maintain the two trust accounts at the level required by statute. The improvement care trust account had a balance of \$74,368.03 as of January 1, 2009, and the merchandise and services trust account had a balance of \$3,426.67 through that date. (*See* annual reports of Independence Trust Company, attached as Exhibit D to the State's motion, and affidavit of Robert Gribble). Combined, the trust account deficiencies are more than \$68,000.00; the improvement care trust fund deficiency is \$29,922.68 and the merchandise and services trust fund deficiency is \$38,341.75. (*See* affidavit of Robert Gribble). Because the merchandise and services trust account has such a small balance, which is being further eroded by the trustee's periodic debits for trustee and tax preparation fees, the State proposes that the funds in the merchandise and services trust account be transferred into the improvement care trust account. With this transfer of funds there would be only one trustee fee and tax preparation fee each year.

Such a transfer would not generally be allowed. The Act provides that "[t]he pre-need merchandise and services trust funds, including the income from the trust funds, after payment of any appropriate trustee fees, commissions and costs, shall remain intact until the merchandise is delivered or the services performed as specified in the sales contract." Tenn. Code Ann. § 46-1-208(a). Individuals holding valid claims against the receivership for prepaid merchandise and/or services ordinarily would be entitled to a pro-rata share of available funds. *See Robertson v.*

¹ These rules are available on the Secretary of State's website: <http://tn.gov/sos/rules/0780/0780-05/0780-05-09.pdf>.

Ramsey, 66 S.W.2d 1022, 1037 (Tenn. Ct. App. 1933). However, as the successor receiver reported to the Court at the status conference held on March 11, 2009, a pro-rata distribution would be *de minimis* and not cost efficient, as the number of claims based on prepaid merchandise and services “far exceeds any reasonable administration of” the approximate balance of \$3,426.67 in the merchandise and services trust fund. (See Transcript of Proceedings on March 11, 2009, p. 5, lines 15-18). Unfortunately, the revocation of Halls’ corporate charter and sale of its assets as proposed by the State will not result in compensation for the unsecured claims that are based on prepaid contracts for merchandise and services, as the New Corporation cannot afford to assume the liabilities of Halls Memory Garden, Inc.

Under the facts of this particular case – where the successor receiver’s best efforts have failed to rehabilitate the Halls cemetery as a for-profit, going concern – the State submits that it would be within the Court’s discretion to merge the balance in the merchandise and services trust fund with the improvement care trust fund to be maintained by the community cemetery for the Cemetery’s long-term care. Such an order would be in keeping with Cemetery Rule 0780-5-9-.17, which requires a community cemetery to have an improvement care trust fund but not a merchandise and services trust fund. Further, the Court has previously recognized its authority under Tennessee case law over the issue of how the cemetery can best be preserved. See memorandum opinion entered by this Court on May 25, 2007, *supra*, citing *State, ex rel. Johnson v. Mount Olivet Cemetery Co.*, 834 S.W.2d 306, 310 (Tenn. Ct. App. 1992).

III. THE \$50,000.00 IN VICTIMS' RESTITUTION MONEY HELD IN THE DEPOSITORY ACCOUNT MAINTAINED BY THE CLERK AND MASTER SHOULD BE USED FIRST TO CORRECT THE DEFICIENCY IN THE IMPROVEMENT CARE TRUST FUND WITH THE BALANCE MADE AVAILABLE TO THE NEW CORPORATION FOR THE COMMUNITY CEMETERY'S OPERATING EXPENSES.

In the 2008 appropriations act, the General Assembly provided \$50,000.00 to establish a victims' restitution fund for individuals defrauded by Halls:

Item 20. In addition to any other funds appropriated by the provisions of this act, there is appropriated the sum of \$50,000 to the Administrative Office of the Courts for the sole purpose of making a grant in such amount to establish a victim restitution pilot project for individuals defrauded in Knox County through the purchase of cemetery plots or other services. Such pilot program shall be administered by the Clerk and Master of the Chancery and Probate Court of Knox County.

2008 Tenn. Pub. Acts, ch. 1203 at § 12, Item 20, p. 61. Currently, these funds are being held in an interest bearing account maintained by the Clerk and Master.

On January 2, 2009, counsel for the Commissioner wrote a letter to the successor receiver, a copy of which was filed with the Clerk and Master, discussing legally-permissible uses of the \$50,000.00 in State appropriated funds in this case. (A copy of the letter is attached as Exhibit E to the State's motion). In that letter, State's counsel stated that Item 20 of the appropriations act "does not guarantee that any particular 'victim' or class of victims will receive all or a portion of the \$50,000.00, and the General Assembly appears to have left the decision making to the discretion of the Clerk and Master." Counsel opined that, in general, the transfer of the State appropriated funds into the improvement care trust account "seems legally permissible under the language of the appropriations act."

The State proposes to transfer from the interest bearing account maintained by the Clerk and Master the \$50,000.00 in State appropriated funds, together with accrued interest, to be used first to correct the deficiency in the improvement care trust account, with the balance being made

available to the New Corporation for community cemetery operating expenses. Unfortunately, the \$50,000.00 in State appropriated funds, even if combined with the small balance in the merchandise and services trust account, is materially insufficient to provide redress for the individual victims' claims made against the receivership. As the successor receiver reported on March 11, 2009, the amount of claims filed against the receivership is such "a huge number" that the administration of the \$50,000.00 "would be costly and would consume a substantial amount of those funds." (See Transcript of Proceedings on March 11, 2009, pp. 5-6, lines 21-25 and 1-11, respectively).

Under the State's proposal then, the funds appropriated by the General Assembly would not be used for compensating the monetary losses of any single person who might have been wronged; however, the funds would be making restitution to the improvement care trust account, as well as providing a modest amount of working capital to the New Corporation for the purpose of maintaining the Cemetery in perpetuity in a manner that shows appropriate respect for the dead. Thus, such use of the State appropriated funds makes restitution to "all" of the victims with an interest in the Cemetery.

IV. HALLS' ASSETS SHOULD BE SOLD WITH THE NET SALE PROCEEDS BEING APPLIED TO THE PAYMENT OF DELINQUENT PROPERTY TAXES, IF AN EXEMPTION CANNOT BE OBTAINED, AND RECEIVERSHIP FEES AND EXPENSES.

As set forth in Section I, *supra*, the Court is authorized to revoke Halls' charter or certificate of authority and to seize and sell its assets, consisting of the Cemetery itself and Halls' 3.17 acre tract of unimproved property adjacent to the Cemetery. Furthermore, the Court is "vested with power to appoint receivers for the safekeeping, collection, management, and disposition of property in litigation in such court, whenever necessary to the ends of substantial justice." Tenn. Code Ann. § 29-1-103. With respect to receivership actions involving

mismanagement of cemeteries, the Court of Appeals has ruled that a court has the discretion to decide how best to preserve the cemetery. *See State ex rel. Johnson*, 834 S.W.2d at 310 (“When the receiver entered into his duties and found the cemetery suffering from serious mismanagement, unable to pay its debts as they came due, with a substantial deficiency in its improvement care fund and a staggering tax obligation, the trial judge, as a matter of general law, had the discretion to decide how the cemetery could best be preserved.”).

The possession of the receiver is the possession of the court appointing him, and all property in the receiver’s hands is in the custody of the court. *Gibson’s Suits in Chancery* § 24.19 (8th ed.). If property is deteriorating and expensive to keep, the receiver may be ordered to sell it. *Id.* at § 24.21. Sale proceeds of property in receivership are subject to such disposition as is decreed by the court; where such property is sold free from liens, such liens attach to the proceeds. 65 Am. Jur. 2d § 335 (Sept. 2008). The court may direct the payment of proceeds from the property sale to the mortgagee who holds the first lien and deed of trust on the property, but claims against the receivership superior to the mortgage lien, such as receivership fees and expenses, must generally be paid before being distributed to the mortgagee. *Id.* The receiver is usually paid from the proceeds of the receivership property that came into his hands. *Gibson’s Suits in Chancery* § 24.24

Consistent with these general principles of receivership law, the Court previously entered orders on July 22, 2008, and December 5, 2007, ordering that Halls’ assets – i.e., the Cemetery and the adjacent 3.17 acre tract – be sold free and clear of all liens or creditor interests with such claims to attach to the proceeds of the sale. By its order authorizing payment to the auctioneer, entered on October 15, 2008, the Court authorized the successor receiver to pay \$7,000.00 for the auctioneer’s work associated with the August 2008 attempted auction of Halls. Again, the

efforts of the auctioneer to sell Halls as a going concern were ineffective and did not result in a sale; and, as reported by the successor receiver on March 11, 2009, additional efforts to negotiate a sale of Halls to a cemetery operator concluded unsuccessfully. (*See* Transcript of Proceedings on March 11, 2009, p. 3, lines 9-24). It therefore has been established very clearly that Halls has little or no monetary value as a cemetery business.

Accordingly, the State proposes that the Court first revoke Halls' charter or certificate of authority and sell free and clear of all liens the Cemetery to the New Corporation for a nominal consideration, which consideration, as discussed above, represents the fair market value of the Cemetery – its nominal sale price notwithstanding. Although First Century Bank (the "Bank") may argue that its mortgage lien on the Cemetery should not be extinguished by the sale, there is no equitable reason for encumbering the New Corporation with the Bank's lien on the Cemetery. In particular: (1) the Bank brought this action to foreclose its deed of trust on the Cemetery and has been involved in attempted auction and negotiated sales that have unfortunately failed; (2) the judicial sale of the Cemetery to the New Corporation would be for a fair, albeit nominal, sale price; and (3) the New Corporation does not intend to engage in the future sale of burial lots, merchandise, or services and, therefore, would not be generating any income from which Halls' indebtedness to the Bank could be satisfied. While it is regrettable that the Cemetery on which the Bank holds its mortgage lien has no monetary value and that there is no other source of funds to satisfy the Bank's claim, these are not sufficient reasons to depart from the ordinary course of selling the property free and clear of all liens and allowing the Bank's claim to attach to the net sale proceeds to be disbursed in the order of priority determined by the Court, a course the Court has previously ordered in this case.

In addition, the State proposes that the adjacent 3.17 acre tract be sold separately from the Cemetery itself through a real estate agent selected by the Clerk and Master, with the net sale proceeds being applied to delinquent county property taxes, if an exemption is not obtained, and the successor receiver's fees and expenses, including repaying the Bank for the draw made by the successor receiver on the Bank's \$15,000.00 line of credit to pay surveyor fees. In opposition to the State's proposal the Sumter's may argue that if the 3.17 acre tract encumbered by their deed of trust is not intended to be used for cemetery expansion purposes, as was contemplated in 2007 when the Court denied their motion, the parcel is no longer needed for cemetery purposes and, therefore, they should be allowed to foreclose.

To such an argument the State would counter that the only way the Cemetery can be salvaged and this receivership action satisfactorily concluded is through a judicial sale of the Cemetery to the New Corporation for operation as a community cemetery. But for the General Assembly's appropriation of \$50,000.00 to establish a victims' restitution fund for individuals defrauded by Halls, the Act would require the sale of Halls' 3.17 acre tract to correct the deficiency in the improvement care trust fund. *See* Tenn. Code Ann. §§ 46-1-307(b), 46-1-309. The sale proceeds of the 3.17 acre tract are now needful – not for expansion purposes or correction of trust fund deficiencies – but to conclude this receivership action under the best possible terms.

In particular, the sale proceeds of the 3.17 acre tract are needed to pay delinquent county property taxes, if an exemption cannot be obtained, as well as the successor receiver's fees and expenses. Even if the improvement care trust account were to be fully funded from the State appropriated funds, the New Corporation may only use the interest income generated by the trust account for any cemetery maintenance and improvement. *See* Tenn. Code Ann. § 46-1-204.

Additionally, the New Corporation will need working capital to cover, for example, repairs that may be undertaken at the Cemetery and the purchase of needed equipment and/or services for cemetery operations.

Mr. Ely and the Sumter's had contended in their 2007 motion for leave to foreclose that neither the Act nor general receivership law could impair their rights to foreclose a purchase money deed of trust. While the Court agreed that a purchase money mortgage is generally entitled to preference over all other claims or liens arising through the mortgagor (*see Guffey v. Creutzinger*, 984 S.W.2d 219, 222-24 (Tenn. Ct. App. 1998)), the Act and Tennessee's general receivership law, such as the case law of *State ex rel. Johnson*, 834 S.W.2d at 310, had been in effect long before Halls signed the Sumter's deed of trust and the underlying installment note. *See* memorandum opinion entered by this Court on May 25, 2007, *supra*. The Court further noted that the Sumter's "are not strangers to the cemetery company," in that Mr. Sumter had an earlier ownership interest in the Cemetery when it was known as Greenfield Memorial Cemetery and, along with his cousin John S. Hill, managed Greenfield until it was sold to Halls and the name was changed in 1998. Quoting our Court of Appeals, the Court went on to say "[i]t is well settled that laws affecting construction or enforcement of a contract existing at the time of its making form a part of the contract," and "[a] statute that affects the construction, enforcement, or discharge of a contract becomes a part of that contract at its inception." *See Cary v. Cary*, 675 S.W.2d 491 (Tenn. Ct. App. 1984), and *In re Liquidation of United American Bank of Knoxville, Tennessee*, 2000 WL 145078 (Tenn. Ct. App. 2000). Furthermore, our Supreme Court has stated: "Laws enacted from considerations of public concern, and to subserve the general welfare cannot be abrogated by mere private agreement. *Recht v. Kelly*, 82 Ill. 147 [25 Au.Rep. 301]." *Shirley v. Shirley*, 181 S.W. 346, 347 (Tenn. 1944).

The Sumter's cannot, therefore, by virtue of having obtained a deed of trust, insulate their collateral from the laws in place to preserve the Cemetery, as well as the Court's previously recognized authority under Tennessee case law over the issue of how the Cemetery can best be preserved. *See* memorandum opinion entered by this Court on May 25, 2007, *supra*, citing *State, ex rel. Johnson*, 834 S.W.2d at 310. If that were permitted, trust deeds could be used to remove cemetery assets from the application of laws enacted for the public welfare, and insiders, as well as others, could use such instruments to evade the Act's intent that cemeteries will be maintained and preserved. Accordingly, the State submits that the New Corporation's financial interests must be protected because it is in the public welfare that the New Corporation be left on sound financial footing so that it may accomplish its purpose of operating Halls as a community cemetery, paying for upkeep and maintenance and providing for burials when lot ownership is established. Unfortunately, the amount of funds available is insufficient to pay delinquent county property taxes, if an exemption cannot be obtained, and to cover receivership fees and expenses, as well as leave a financially-viable New Corporation to operate the Cemetery as a community cemetery for the public welfare.

For the foregoing reasons and in accordance with the intent of the Act, as well as the general principles of receivership and contract law, Halls' assets should be sold and the proceeds used first to pay the delinquent county property taxes, if an exemption cannot be obtained, with any remaining balance applied to the receivership fees and expenses, including repaying the Bank for the draw made by the successor receiver on the Bank's \$15,000.00 line of credit to pay surveyor fees.

CONCLUSION

Halls Memory Garden does not have a good name — either in the Halls Community or beyond. The fraud that the cemetery company perpetrated on lot owners and purchasers of pre-paid contracts for merchandise and services has been covered widely by the media. Public knowledge of their plights, and of this litigation, has resulted in the Cemetery's being viewed as a white elephant. No reputable cemetery operator wants to acquire it.

As part of the receivership proceeding this Court has jurisdiction over how the Cemetery can best be preserved. With no other known market for the Cemetery, and therefore no viable alternative to the State's proposal now before this Court, and with no apparent benefit to prolonging this litigation further, the State submits it is now time to minimize additional loss and bring this case to its best possible conclusion. Under the circumstances, the Court's granting the State's motion would provide a means for achieving the best and most equitable resolution of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2009, a true and exact copy of the foregoing memorandum of law has been forwarded by electronic mail and by First Class U.S. mail, postage pre-paid, to:


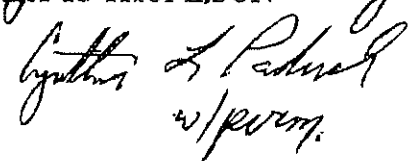
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A true and exact copy of pages 1 through 4 of the State of Tennessee's motion for revocation of the corporate charter of Halls Memory Garden, Inc., the sale of its assets, and the resolution of this case has also been forwarded by First Class U.S. mail, postage prepaid, to those lot owners and receivership claimants whose names and addresses have been provided to the State by the successor receiver, a listing of such individuals and their addresses being attached to the State's motion filed herewith and the entire motion and memorandum of law, with all supporting exhibits, has been posted on the Internet, along with an address and telephone number through which a copy of the entire pleading can be obtained upon request, on April 27, 2009, with additional notice to be given by publication in the Halls Shopper.


GARY R. THOMPSON

w/pwmp